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IN THE

SUPREME COURT

OF THE

UNITED STATES

Silas Supreme Court U. S.
FILED
APR 1904
JAMES H. McKENNEY,
Clerk.
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October Term, 1903.

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No. 220.

William S. Elder, as Administrator of the Estate of Rufus Wilsey, Deceased; Elizabeth Wilsey, et al.,

PLAINTIFFS IN ERROR,

vs.

The Horseshoe Mining and Milling Company, Joseph M. Thomas, et al.,

DEFENDANTS IN ERROR,

In Error to the Supreme Court of the State of South Dakota.

BRIEF OF DEFENDANTS IN ERROR

MOODY, KELLAR & MOODY,
Attorneys for Defendants in Error.

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STATEMENT.

The statement contained in the brief of plaintiffs in error we think defective in that it only presents one of the defenses interposed by the defendants in error, each of which was adjudi-

cated by the trial court in favor of defendants in error, and each of which was sufficient in itself to dispose of the controversy upon its merits.

The defendants in error, who were defendants below, interposed to the claim of plaintiffs three defenses:

(1) The loss of the title of Rufus Wilsey, ancestor of plaintiffs in error, of the undivided one-half interest in the Golden Sand lode through certain forfeiture proceedings prosecuted by one C. H. Havens, the co-owner of said Wilson, the said Havens having subsequently conveyed to the defendants in error.

(2) That the ground in controversy, which was formerly called the Golden Sand lode, was re-located by one Joseph M. Thomas as the North lode, and that to the application of said Thomas for patent to said North lode no protest or adverse was made. The defendants in error succeeding to the title thus acquired by the said Thomas.

(3) That plaintiffs in error were barred and estopped from maintaining this action by reason of their gross laches and unexcused neglect in reference to the property in controversy.

Each of said defenses is fully covered by the pleadings and by the decision of the trial court, which, under the laws of South Dakota, must be in writing and must separately state the Findings of Fact and the Conclusions of Law.

(Transcript pages 10 to 18 inclusive, and particularly Conclusion 3 and 4, on page 18.)

The judgment of the trial court was based upon said written decision. (See judgment transcript, page 19.)

The judgment of the Supreme Court of South Dakota now before this court for review affirmed the said decision and judgment of the trial court. (See top page 20, transcript of record.)

I.

THIS COURT HAS NO JURISDICTION AND THE WRIT OF ERROR SHOULD BE DISMISSED.

"It is the settled law that where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or Laws of the United States another question, not federal, has been also raised and decided against such party, and the decision of the latter question is sufficient notwithstanding the federal question to sustain the judgment, this court will not review the judgment."

Jenkins, assignee, vs. Loewenthal,
110 U. S. 222.
s. c. 3 Sup. Ct. Rep. 638.
Adams vs. Burlington & M. R. R. R. Co.,
112 U. S. 123.
s. c. 5 Sup. Ct. Rep. 77.
Murdock vs. Memphis, 20 Wallace, 590.
Eustis vs. Bolles, 150 U. S. 361.
s. c. 14 Sup. Ct. Rep. 131.
California Powder Works vs. Davis,
151 U. S. 389.
s. c. 14 Sup. Ct. Rep. 350 at 351.
Missouri Pacific R. R. Co., vs. Fitzgerald,
160 U. S. 556.
s. c. 16 Sup. Ct. Rep. 389 at 399.
Weyerheusen vs. Minnesota, 176 U. S. 550.
Harrison vs. Morton, 171 U. S. 38.
s. c. 18 Sup. Ct. Rep. 743.
De Saussure vs. Gaillard, 124 U. S. 216.
s. c. 8 Sup. Ct. Rep. 1053.
Roby vs. Colehour, 146 U. S. 153.
Pittsburg, etc., Co., vs. Cleveland Co., 178 U. S. 270.
s. c. 20 Sup. Ct. Rep. 931.
Chappel Co. vs. Sulphur M. Co., 172 U. S. 465.
Peirce vs. Somerset Ry., 171 U. S. 641.
s. c. 19 Sup. Ct. Rep. 64.

In Missouri Pacific R. R. Co. vs. Fitzgerald, 160 U. S. 556, the court said:

> "We repeat what we said in California Powder Works vs. Davis, 151 U. S. 389, that 'It is axiomatic that in order to give this court jurisdiction on writ of error to the highest court of a state in which a decision could be had it must appear affirmatively not only that a federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it.'"

Moran vs. Horsky, 178 U. S. 205.
s. c. 20 Sup. Ct. Rep. 857.
Johnson vs. Risk, 137 U. S. 300.
s. c. 11 Sup. Ct. Rep. 111.
Snell vs. City of Chicago, 152 U. S. 191.
s. c. 14 Sup. Ct. Rep. 489.

In Jenkins vs. Loewenthal, 110 U. S. 222 supra, two defenses were interposed, one presented a federal question, the other did not. This court said:

> "Either of these defenses if sustained bars the action. The second involves a federal question, the other does not. The court in its decree sustained them both, and, among other things, found as a fact that the defendants were innocent purchasers for value. As this finding is broad enough to maintain the decree even though the federal question involved in the other defense was decided wrong we affirm the decree without considering that question or expressing any opinion upon it."

In Murdock vs. Memphis, 20 Wallace 590, the court said: "Why should a judgment be reversed for an error in deciding the federal question when the same judgment must be rendered on the other points in the case? And why should this court reverse a judgment which is right on the whole record presented to us; or where the same judgment will be rendered by the court below after they have cor-

rected the error in the federal question? We have already laid down the rule that we are not authorized to examine these other questions for the purpose of deciding whether the State Court ruled correctly on them or not. We are of opinion that on these subjects not embraced in the class of questions stated in the statute we must receive the decision of the State Courts as conclusive. But when we find that the State Court has decided the federal question erroneously, then to prevent a useless and profitless reversal which can do the plaintiff in error no good, and can only embarrass and delay the defendant, we must so far look into the remainder of the record as to see whether the decision of the federal question alone is sufficient to dispose of the case, or to require its reversal; or, on the other hand, whether there exist other matters in the record actually decided by the State Court which are sufficient to maintain the judgment of that court, notwithstanding the error in deciding the federal question. In the latter case the court would not be justified in reversing the judgment of the State Court."

We submit that the case at bar comes clearly within the rule of Jenkins vs. Loewenthal, 110 U. S. 222 supra. The findings in the case at bar fully sustain the defenses (a) of laches and estoppel, and (b) of failure to protest or adverse against the patent application of Thomas. Neither of these is a federal question.

DeLamar's Nevada G. M. Co. vs. Nesbitt, 177 U. S. 523.
s. c. 20 Sup. Ct. Rep. 715.
Blackburne vs. Portland G. M. Co., 175 U. S. 571.
s. c. 20 Sup. Ct. Rep. 222.
Weyerheusen vs. Minnesota, 176 U. S. 550.
Adams Co. vs. Burlington & M. R. R. R. Co.,
112 U. S. 123.
s. c. 5 Sup. Ct. Rep. 77.
Pittsburg Co. vs. Cleveland Co., 178 U. S. 270.
s. c. 20 Sup. Ct. Rep. 931.
Moran vs. Horsky, 178 U. S. 205.
s. c. 20 Sup. Ct. Rep. 857.

In the last named case the defense of laches was sustained against the assertion of a right to a mining claim after some fourteen years of abandonment.

In Adams vs. Burlington & M. R. R. R. Co., 112 U. S. 123, a finding in the record sustaining the defense of estoppel was held sufficient to deprive this court of jurisdiction.

Under the law and practice of the State of South Dakota the written decision of the trial court, consisting of separate Findings of Fact and Conclusions of Law, is a part of the record, and judgment must be entered according to such decision. It is also a part of the judgment roll.

> "Upon the trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision, and no judgment shall be rendered or entered until after the filing of such decision."

(Section 5066 Comp. Stats. of Dak. 1887. Same section: Sec. 276 Code of Civ. Proc. of Rev. Codes of S. Dak. 1903.)

> "In giving the decision the facts found and the conclusions must be separately stated. Judgment upon the decision must be entered accordingly."

(Sec. 5067 Comp. Stats. of Dak. 1887. Same section: Sec. 277 Code of Civ. Proc. of Rev. Codes of S. D. 1903.)

> Garr, Scott & Co. vs. Spaulding, 51 N. W. 866 at 868.
> Colonial Mortgage Co. vs. Bradley,
> 55 N. W. 1108 at 1109.

> "Upon an appeal being perfected, the clerk of the court from which the appeal is taken shall forthwith transmit to the Supreme Court, if the appeal is from a judgment, the judgment roll."

(Sec. 5217 Comp. Stats. of Dak. 1887. Same section: Sec. 443 Code of Civ. Proc. of Rev. Codes of S. Dak. 1903.)

> "Unless the party or his attorney shall furnish a judgment roll, the clerk, immediately after entering the judgment,

shall attach together and file the following papers, which shall constitute the judgment roll: (1) In case the complaint be not answered by any defendant the summons and complaint, or copies thereof, proof of service and that no answer has been received, the report if any, and a copy of the judgment. (2) In all other cases, the summons, pleadings, or copies thereof, the offer of the defendant, exceptions, case, and all orders or papers in any way involving the merits and necessarily affecting the judgment."

(Sec. 5103 Comp. Stats. of Dak. 1887. Same section: Sec. 319 Code of Civ. Proc. of Rev. Codes of S. Dak. 1903.)

The decision of the trial court is a part of the judgment roll.

Colonial Mgt. Co. vs. Bradley, 4 S. D. 158.
s. c. 55 N. W. 1108.
Garr, Scott Co. vs. Spaulding, 2 N. D. 414
s. c. 51 N. W. 867.

The opinion of the court is no part of the record on appeal.

Vol. 15 Ency. Pl. & Pr. p. 309 and 311, and cases cited.

This court in construing the Judiciary Act of 1789, Section 25, held that it would not consider the opinion of the lower court for the purpose of ascertaining whether a federal question had been decided.

Gibson vs. Choteau, 8 Wallace 314.
s. c. 4 Sup. Ct. Rep. 340.
Rector vs. Ashley, 6 Wallace 142.
s. c. Bk. 18 L. C. P. Co. 753.
Williams vs. Norris, 12 Wheat. 117.
s. c. 6 L. C. P. Co. 571.

It was later held, construing the Act of February 5th, 1867, that in cases arising in the States of Illinois and Louisiana this court would consider such opinions in view of the peculiar statutes of those States making such opinion a part of the record.

Except in the case of Murdock vs. Memphis, 20 Wallace 590, we have found no case in which this question was specifically raised, except as stated in cases arising in States of Louisiana and Illinois. Moreover, we think it will be found that in every instance where reference has been made to the opinion of the lower court as to the points upon which a judgment was rendered that under the law and practice of the particular State in which such judgment was rendered there was no mandatory statute requiring a written decision of separate findings and conclusions as a necessary prerequisite upon which to predicate the judgment of the trial court such as is the law in the State of South Dakota. In Murdock vs. Memphis, 20 Wallace, 590, after holding that reference might be made to the opinion of the lower court to ascertain what was decided, the court continued as follows:

> "But after all, the record of the case, its pleadings, bills of exception, judgment, evidence, in short its record, whether it be a case in law or equity, must be the chief foundation of the inquiry, and while we are not prepared to fix any absolute limit to the sources of the inquiry under the new Act, we feel quite sure it was not intended to open the scope of it to any loose range of investigation."

We submit that in the case at bar this court is under no necessity of permitting the opinion of the Supreme Court of South Dakota, which is not a part of the record, to overthrow the record, which clearly shows by the findings and conclusions, by the judgment of the trial court based thereon, and by the judgment of the Supreme Court of South Dakota affirming the same, that other than federal questions upon which this judgment can be based were actually decided in favor of the defendants in error.

In Roby vs. Colehour, 146 U. S. 153, s. c. Sup. Ct. Rep. 47, neither the opinion of the trial court nor of the Supreme Court

of the State disclose that any question of a federal nature was passed upon, yet the court held that the necessary effect of the decree was to determine adversely to the plaintiff in error certain rights claimed by him in his pleadings, and therefore retained jurisdiction of the case. If the opinion of both the trial court and the Supreme Court of the State can be disregarded for the purpose of ascertaining from the record, that a federal question was involved, can it be successfully urged that the opinion shall be controlling where, as in the case at bar, the record affirmatively shows that the case was disposed of upon the merits upon grounds not of a federal nature? Apply the reasoning in Roby vs. Colehour to the case at bar. Is not the necessary effect of the findings and conclusions of the trial court, to dispose of the cause on grounds not of a federal character?

(B)

The jurisdiction of this court is invoked under Revised Statutes, Section 709 (Comp. Statutes of U. S. 1901, p. 575, West Pub. Co.)) by reason of the fact that some title or right is claimed under a statute of the United States, and that the decision of the lower court is against such title or right.

Where the jurisdiction of this court depends upon the denial by the State Court of a title or right claimed under a statute of the United States it must appear o n the record that such title or right was specially set up and claimed under some particular statute, and that the decision of the lower court was against the right or title so set up or claimed.

DeLamar's Nevada G. M. Co. vs. Nesbitt, 177 U. S. 523.
s. c. 20 Sup. Ct. Rep. 715.
F. G. Oxley Stave Co. vs. Butler Co., 166 U. S. 648.
s. c. 17 Sup. Ct. Rep. 709.
Mutual Life Ins. Co. vs. MsGrew, 188 U. S. 291.
s. c. 23 Sup. Ct. Rep. 375 at 378.
California Powder Works vs. Davis,
151 U. S. 389.
s. c. 14 Sup. Ct. Rep. 350.

The only federal statute under which the plaintiff in error claims any right or title is Section 2319 of the U. S. Revised Statutes. But the trial court and the Supreme Court of South Dakota did not deny the plaintiffs in error any right or title under this statute, nor under any other federal statute under which the plaintiffs in error claimed any right or title. The lower courts acknowledge the original title of the ancestor of plaintiffs in error by virtue of the due location of the Golden Sand mining claim. Having acknowledged and held valid the title of the ancestor of plaintiffs originally, the court then proceeded to examine the right and title specially set up and claimed by the defendants in error under and by virtue of Section 2324 of the U. S. Revised Statutes (U. S. Comp. Laws 1901, vol. 2, page 1426), providing the method of forfeiting out a delinquent co-owner. The courts below construed this section in such manner as to hold that the forfeiture proceedings of the grantors of defendants in error were valid and sustained the right and title thus specially set up by the defendants in error. The mere fact that the federal statute has been construed by the lower court is not sufficient grounds upon which to base the jurisdiction of this court. There must be not only a construction of the statute, but such construction must deny to the plaintiffs in error some right or title specially set up and claimed by them under such statute thus construed. (See cases just cited, supra, and authorities therein referred to.) The statute construed in the case at bar was invoked by the defendants in error, and its construction was in favor of the right and title by them set up.

We submit that the case above cited of De Lamars Nevada Gold Mining Co. vs. Nesbitt, 177 U. S. 523, is decisive of this question. That was an adverse mining suit. The defendant in error had invoked the provisions of the Acts of Congress of November 3rd, 1893, and July 18th, 1894, suspending the forfeiture of mining claims for failure to do the required amount of

work, and by virtue of the construction which the Supreme Court of the State of Nevada placed upon these two Acts of Congress the defendants in error prevailed in the court below. The plaintiffs in error in that case invoked the jurisdiction of this court upon the grounds: First, that under the provisions of the United States Revised Statutes, sections 2325 and 2326, providing for the trial of adverse claims to mining patent, a federal question was necessarily involved; and second, t hat a federal question was involved by reason of the construction of the Acts of Congress of November 3rd, 1893, and July 18th, 1894, suspending the forfeiture of mining claims for failure to do the required amount of work. This court held against the contention of plaintiffs in error on both points, holding, first, that the construction of said sections of the Revised Statutes providing for the trial of adverse claims to mining patents did not involve a federal question; and, second, that while a federal question was undoubtedly raised in the case by the construction of the Acts of Congress of November 3rd, 1893, and July 18th, 1894, yet that this federal question was raised by the defendants in error and not by the plaintiffs in error, and that the decision of the court was in favor of the right claimed under this particular statute. The court in its opinion said:

> "To raise a federal question the right must be one claimed under a particular statute of the United States, the validity, construction or applicability of which was made the subject of dispute in the State Court; and the decision upon such statute must have been adverse to the plaintiff in error. No federal question was presented by the pleadings in the case, and the whole gravamen of defendant's argument was, not the denial to it of any right under the mining laws of the United States, but the invalidity of the proceedings under which Nesbitt Brothers had acquired the interest of De Beque and Stevens in the Fraction mine. There was undoubtedly a federal question raised in the case, but it was raised by the plaintiff Nesbitt, who based his right to recover upon the Acts of Congress of November 3rd, 1893,

and July 18th, 1904, suspending the forfeiture of mining claims for failure to do the required amount of work. The decision of the court, however, was in favor of, and not against, the right claimed under this statute, and of this construction the plaintiff in error is in no position to take advantage, as it made no claim under those statutes. This subject was considered in the case of Missouri vs. Adriano, 130 U. S. 496, 34 L. ed. 1012, 11 Sup. Ct. Rep. 385, in which the contest was between rival claimants to the office of sheriff. Respondent relied upon the fact that he had received a majority of the votes cast at a popular election for the office. Relator claimed the election to be void under the State Constitution, which declared that no one should be elected or appointed to office who was not a citizen of the United States. Respondent admitted his foreign birth, but claimed that, under Rev. Stat., Section 2172, he became a citizen by the naturalization of his father. The decision of the court was in his favor, and it was held that the relator had no right to a review of the question in this court, although if the judgment had been adverse to the claim of the respondent there would have been no doubt of his right to a writ of error. It was said that the right or privilege must be personal to the plaintiff in error, and that he was not entitled to a review where the right or privilege was asserted by the other party and the decision was in favor of that party and adverse to himself. It is manifest that the object of Section 709 was not to give a right of review wherever the validity of an Act of Congress was drawn in question, but to prevent States from frittering away the authority of the federal government by limiting too closely the construction of federal statutes. Hence the writ of error will only lie where the decision is adverse to the right claimed."

(2)

IT IS CONTENDED THAT THE NOTICE OF FORFEITURE WAS INSUFFICIENTLY ADDRESSED.

(A)

This question was considered by the Supreme Court of South Dakota in the first appeal in this case, on which appeal the

present defendants in error prosecuted an appeal to the Supreme Court of South Dakota and reversed the judgment of the lower court, and the judgment of the Supreme Court on that appeal was rendered May 6th, 1897. (Transcript of record, pages 22 to 29. Reported 9 S. D. 636, s. c. 70 N. W. 1060.)

On the second trial of the cause judgment of the trial court was in favor of the defendants, and the judgment of the Supreme Court affirming such judgment was rendered October 2, 1901. (Transcript pages 19 and 20. Reported 15 S. D. 124, s. c. 87 N. W. 586.)

In this last appeal the question was not urged or passed upon by the Supreme Court as to whether the notice of forfeiture was sufficiently addressed. The only question passed upon in the opinion of the court was as to the sufficiency of the publication of the notice. If a strict construction is to be invoked under which the opinion of the Supreme Court of South Dakota is to absolutely fix and limit the questions decided, for the purpose of conferring jurisdiction upon this court, it seems to us that logically the only question which this court can consider is as to the sufficiency of the publication of the notice, this writ of error not having been sued out to the former judgment of the Supreme Court, and the time within which to sue out such writ having elapsed.

(B)

Revised Statutes U. S., Section 2324, contains no requirement as to any address or heading of the notice. It is similar in this respect to the notice required to be published when application for patent is made, which notice is not required to be addressed to any one, nor as a matter of practice is addressed to any one. If no adverse claim is filed within sixty days after first publication of such notice for patent the rights of all parties holding adverse claims are cut off. It might be much more con-

sistently contended that the notice of application for patent should be directed to the specific persons whose rights will be affected by the allowance of the patent, such as conflicting claimants, lien holders, etc., than that a notice of forfeiture should by name specify the co-owner whose rights are to be affected by the forfeiture proceedings. In case of the notice of the application for patent, such application is for the entry of a certain specified mining claim, the name of which is given, together with its description by metes and bounds. As a matter of fact to the layman such description is meaningless. The owner of an adjoining mining claim which may be prior in point of time and validity and which may overlap the junior location can only safely protect himself by keeping careful watch of the actual boundaries of his own claim upon the ground, and by thus advising himself whether or not a survey for patent for the hostile claim has been made, and whether the patent stakes have been so placed as to include any of his ground. Even though he should carefully read the published notice of every application for patent printed in all of the newspapers in which it might be possible to print such notice, it would be impossible for him to protect himself against an adverse application. The application for patent may be for a claim the name of which he has never heard. In short, there is absolutely nothing in such notice which as a matter of practical experience advises the owner of the prior location of the fact that a subsequently located claim by the particular name in question is passing to patent. We have an illustration of this in the case at bar. Joseph Thomas relocated the Golden Sand lode under the name of the North lode, and applied for patent for the North lode. A notice of application for patent for the North lode was published, giving its description by metes and bounds. The heirs of Wilsey, who are the plaintiffs in error, might have read the notice of such application for patent for the North lode numbers of times, and yet never have thought that the patenting of the North lode to Joseph Thomas

would in any wise affect their rights as owners of the Golden Sand lode, although as a matter of fact the exterior boundaries of the two claims were identical, and the North lode was the junior location. Werefer to this for the purpose of calling the court's attention to the policy of the United States in the enactment of its statutes regarding the development of its mineral resources, and to show that it has been the policy of the government to create an expeditious and inexpensive system by which the title to such mineral ground may be transferred to those entitled thereto.

The objections urged by plaintiffs in error to the notice of forfeiture are not in our judgment tenable.

The notice is addressed: "To Rufus Wilsey, his heirs, administrators, and to whom it may concern." What is the object of the notice? Is that object accomplished by a notice so addressed or entitled? Suppose the notice so addressed had in fact been personally served by the delivery of a copy thereof to Elizabeth Wilsey, one of the heirs. Would she be heard to say that she had not received notice of her delinquency simply because her name was not inserted in the notice? Assuredly not. Rufus Wilsey being dead she knew under the law that she was an heir. The notice referring in terms by name to the Golden Sand lode her attention would be specifically called to the property affected by the proceedings. There could be no doubt as to the advising quality of such a notice. It must be seen at a glance that the notice in question is much more definite and specific in its informative character than the notice for application for patent given under quite a similar statute.

Logically the notice if sufficient when personally delivered must be sufficient when served by publication. The law making power evidently contemplated that the service would be by publication inasmuch as the statute prescribes no conditions what-

ever under which the notice shall be personally served, but it is left entirely optional with the party giving the notice, clearly indicating that the notice would ordinarily be served by publication. Would a notice directed "To Elizabeth Wilsey, etc.,' and published the required length of time in the "Belt Daily Herald," published in Lead City, South Dakota, have been any more likely to convey the information to Elizabeth Wilsey, who lived in the State of Iowa, than the publication of the notice in question?

There is no reason why the court should be over indulgent to that co-owner who has been deliberately delinquent in the performance of that duty required by the government as a condition upon which he is permitted to hold the title to its public mineral lands. It is the policy of the law to develop the mineral resources. It should be the policy of the law to protect that particular co-owner who in good faith recognizes such policy. Theheirs of Rufus Wilsey knew of the existence of this claim, and for fourteen years abandoned it, knowing that the necessary result of their conduct would be to subject the claim to relocation by outside parties or to compel their co-owner to perform their share of the labor..

The view of this question taken by the Supreme Court of South Dakota has heretofore received the uniform sanction of the United States Land Department. When an application for patent is made an abstract of title is furnished; and when it appears from such abstract that a notice of forfeiture has been published for the proper time, and an affidavit filed showing that no contribution has been made as thereby required, the title under such showing is held to be sufficient. As suggested by the Supreme Court of South Dakota in its first opinion, if the construction contended for by plaintiffs in error is correct it would be incumbent upon the department to require proof that

the co-owner was living at the time the notice was published, or if dead that an administrator was appointed, and that each of the heirs was duly served:

> "With such a construction the provisions of the forfeiture statute would be worthless, and instead of conferring a benefit upon the co-owner would be a delusion and a snare. No person could safely invest in a claim in the chain of title to which there was such a notice, however regular it might appear to be by the record." (Elder vs. Horseshoe Min. Co., 9 S. D. 637.)

The notice in question is similar to the notice required by the statute of South Dakota to be given in the foreclosure of a mortgage by advertisement. The statute of South Dakota provides for the foreclosure by advertisement of mortgages containing a power of sale. The statute providing as follows:

> "Notice that such mortgage will be foreclosed by sale of the mortgaged premises or some part of them must be given by publishing the same for six successive weeks at least once in each week in a newspaper of the county where the premises intended to be sold or some of them are situated, if there be one, and if not then in the nearest newspaper published in the territory."
>
> (Sec. 5414 Comp. Statutes S. Dakota, 1887.)
>
> "Every notice must specify: (1) The names of the mortgagor and mortgagee, and the assignee if any. (2) The date of the mortgage. (3) The amount claimed to be due thereon at the date of the notice. (4) A description of the mortgaged premises conforming substantially with that contained in the mortgage; and (5) The time and place of sale." (Sec. 5415 Comp. Statutes S. Dakota, 1887.)

The Supreme Court of South Dakota in construing this statute held:

> "By the statute of this state no notice of sale is required to be served upon anybody. General notice to all interested

is given by publication. There are no parties to the proceeding, as in an action for foreclosure; and yet the proceeding, where authorized by a power of sale in the mortgagee, was, without question, intended to take the place of a foreclosure by action, and to have the effect of an old foreclosure in equity. The statute having made no provision for service of notice of the sale either upon heirs or others interested in the mortgaged property, such service if made would be entirely voluntary on the part of the mortgagee and could add nothing to the legal effect of the sale."

By such notice and such proceedings the claims of all persons including minor heirs of the mortgagor are cut off. As the state made no provision for directing the notice to any particular persons the court declined to inject such provision by construction.

Reilly vs. Phillips, 4 S. D. 604, s. c. 57 N. W. 780.

(C)

It is contended by counsel that the administrator is a necessary party to a complete determination of the title of real property, and that therefore it is necessary that the name of the administrator should be inserted in the notice of forfeiture. The same reasons which would obviate the necessity of specifying by name each of the heirs would also obviate the necessity of specifying the administrator.

An additional and conclusive answer to this contention is found in the statute itself, which provides that notice of forfeiture shall be given co-owners. The statute makes no provision whatever for the giving of any notice to lienors. The Supreme Court of South Dakota has decided that under the laws of that State the title to real estate upon the death of an owner devolves upon the heirs and vests in them immediately. An administrator has merely a lien upon such property for certain limited purposes. Upon well recognized principles the de-

cision of the South Dakota Supreme Court upon that question is conclusive upon this court.

Elder vs. Horseshoe Min. Co., 9 S. D. 636 at page 642.

The administrator of the Wilsey estate was therefore not a co-owner with Havens in the Golden Sand claim at any time and was therefore not entitled to any notice. It is contended by counsel that notwithstanding the fact that the statute only requires a notice of forfeiture to be given co-owners, yet the administrator is entitled to notice in order that he may be bound as to his lien upon the real estate which he holds for the purpose of paying creditors, and suggests that Havens could not have acquired a perfect title as against said administrator even by deed from the heirs of Wilsey, and therefore could not acquire title through the forfeiture proceedings. The fallacy of this contention is that counsel overlooks the fact that the administrator and creditors take whatever lien or title they may have upon the mining property in question subject to the laws of the United States, one of which laws is the forfeiture statute in question, by the express terms of which all of the liens and rights of such creditors and administrators can be disposed of by notice given, not to them, but to the co-owners only, against whose interests such liens are claimed. It is not for the creditors or administrator to say that their property except by the tors or administrator to say that their property is divested without due process of law, because they have no property, except by the indulgence and permission of the United States government, as expressed in its laws relative to mining claims. But for these laws they would have nothing. By reason of these laws they have something but that something must be accepted subject to the conditions of the statutes granting it.

The argument of counsel as set forth in paragraph 2, on page 6, of his brief, in our judgment clearly illustrates the neces-

sity of adopting the construction of this statute placed upon it by the Supreme Court of South Dakota. If the administrator of the Wilsey estate could demand that notice be directed to him, every mortgagee, miner's lienor and other person claiming any kind of lien upon the co-owner's interest could with equal reason insist that notice be directed also to him.

(D)

The authorities cited by counsel in support of the proposition that the notice must be specifically directed to the heir by name are not applicable under the statute in question. All of such authorities arise under statutes containing requirements as to the contents and form of the respective notices or process construed.

(3)

THE NOTICE OF FORFEITURE WAS SUFFICIENTLY PUBLISHED.

Counsel contends that the expression in the statute, "for at least once a week for ninety days," requires the publication both upon the first and last day. We can not approve the logic of counsel's argument. On the contrary, the very stating of the proposition as made by counsel himself, in our judgment discloses its fallacy. Counsel, on page 13 of his brief, in referring to the application of his authorities, says:

> "Furthermore, the statutes in all the foregoing cases require publication once in each week for a certain number of weeks; therefore, a publication in one week might well be held to continue throughout that week, and last for the six days immediately following; but where a publication is required once in each week for a given number of days it can not be held that the last publication extends or continues for any number of days after its completion. It is a publication for the day only on which it is made."

If this reasoning be sound, it must necessarily follow that the publication on one day in the first week would be good for that day only upon which it was made; and therefore if the publication under the statute in question was made only once the first week there would be no publication for the six other days of that week, because the requirement of the statute that the publication shall be made "for ninety days" of necessity must apply with as much force to the first seven days of the ninety as to the last seven days. How often must publication be made under the statute in question? Confessedly once only in each week. No more. If one publication the first week be sufficient, by what authority shall we say that two publications must be required for the last week? If one publication in each of the first three weeks be sufficient for the first twenty days, why shall not one publication each week be sufficient for ninety days? Notwithstanding the fact that the last publication was made on Tuesday, April 2nd, in the last week, and that the ninety days did not expire until Saturday, April 6th, upon which day the ninety days had expired.

Counsel objects to the contention of defendants in error that the phrase "at least once a week" modifies the phrase "for ninety days." We do not so contend. What we do contend is that the phrase "at least once a week" shall not be eliminated from the statute; that it shall be construed as meaning something and as not having been idly injected into the statute for no purpose. "At least once a week" fixes the number of publications, and a greater number of publications would be entirely gratuitous and superfluous. "For ninety days" fixes the time within the limits of which the delinquent co-owner may prevent a forfeiture and save his rights by the payment of his share of annual labor. Counsel argues:

> "If a publication in one week is equivalent to a publication for seven days, as defendants contend, they why is not a

publication in one month equivalent to a publication for thirty days, or a publication in one year equivalent to a publication for three hundred and sixty-five days?"

(Plaintiffs' brief, bottom of page 10.)

We answer that if the statute so provided, as in the case at bar, such publication would be sufficient. If the statute required publication once each month for forty-five days could it be logically contended that the publication in the second month must be upon the forty-fifth day? Would not a publication on the first day of July, for instance, and the sixth day of August be a compliance with such a requirement for the happening of any event on the 15th day of August? If the statute required a publication once each year for one thousand days, will it be contended that the last publication must be upon the one-thousandth day? Would not one publication in each year, providing the last publication was before the thousandth day, be a full compliance with such statute? Counsel thus states the question: "The question is: Is a publication once each day for eighty-five days a publication for 'at least once a week for ninety day?'" This is not the question. The question is: Is a publication once each week, and no more, a publication once each week for ninety days after the lapse of ninety days from the first publication? The notice in question was published in a daily paper beginning Monday, January 7th, 1889, and ending Tuesday, April 2nd, 1889. There were six publications in each week except the last. In the last week there were two publications, one on Monday, April 1st, 1889, and the last on Tuesday, April 2nd, 1889. The ninety days expired on the following Saturday, April 6th, 1889. A publication on the following Monday, April 8th, 1889, would have been in the week following the full expiration of the ninety days, and therefore entirely gratuitous.

Permit us to quote the decision of the South Dakota court in Elder vs. Horseshoe M. & M. Co., 15 S. D. 124, s. c. 87 N. W. 586:

> "The phrase 'for at least once a week for ninety days' should be rendered 'at least once a week during ninety days;' that is to say, there shall be at least one publication in each week during the prescribed period. In other words, notice shall continue ninety days, and one publication each week constitutes the notice required. Necessarily, the ninety day period begins with the first publication. In the case at bar it began on Monday, January 7th. The publication on that day was sufficient for the week beginning on that day. Publication on the following and each succeeding Monday would certainly constitute at least one publication each week while so continued. There was a publication on each Monday from January 7th to April 1st, both inclusive. If no publication was required after the first until the following Monday none was required after April 1st until the following Monday, April 8th, and on that day the period of ninety days had been completed. Including the first day of publication, ninety days ended on Saturday, April 6th. Excluding the first day ninety days ended on Sunday, April 7th. On that day the required notice had continued during ninety days, and another publication on Monday, April 8th, was wholly unnecessary. Conceding that the statute should be strictly construed we think there was a complete compliance with the provisions respecting the duration of the publication."

(....)

We submit that the authorities of the plaintiffs in error do not sustain their decision.

PLAINTIFF'S AUTHORITIES.

The first case cited by counsel is Early vs. Doe, 16 Howard 617. This was a tax sale. The statute required notice of the sale to be published "once in each week for at least twelve successive weeks." The day of sale appointed by the notice was

the 15th of November, 1848. The first publication was August 26th; the last, November 15th, the day of sale; and the court included both days in its calculation, but, as a matter of fact this made only 82 days, not 12 full weeks, and the difficulty was, as stated by Justice Nelson, not that the notice had not been published a sufficient number of times, or continued to a sufficiently late period, but that 12 full weeks notice had not been given; that is, 12 weeks had not elapsed from the first publication to the day appointed for the sale, which happened in this instance to be the last day of publication also. There can be no objection to this decision. It is clearly the law, and there is no contention here whatever that if Wilsey's heirs had come in at any time before the expiration of the 180 days from the first publication of notice they would have been entitled to redeem. But suppose in the case of Early vs. Doe, the tax sale had been set for the 18th or 20th, with the last publication on the 15th, could there have been any doubt of its legality? There would then clearly have been 12 full weeks' notice from the first publication to the day of sale, and the notice would have been published once in each week embraced in the period; yet there would have been no more time between the first and last publication than there was in the case as it was presented to the court.

The next case in counsel's brief, Wilson vs. N. W. Mut. Ins. Co., 65 Fed. Rep. 38, is like the other. It was a sale on foreclosure of mortgage. The statute required publication "once a week for at least four weeks prior to such sale." The first publication was on Friday, November 10th, 1893, the sale was made on Thursday, December 7th, and although the court included the first day, it held that the four weeks from the first day was not completed until midnight of December 7th, and that therefore a sale at two o'clock on the afternoon of that day was not four weeks from the day of the first publication. The court cites the cases from the 21 Minn., 58 Ga., 56 Mich., and 59 Ind., which are cited at the foot of page 12 of counsel's brief. There is no

disputing the correctness of this decision. And we dare say the others cited in support of it are to the same effect. That of Bacon vs. Kennedy, 56 Mich. 329, or 22 N. W. Rep. 824, is clearly so. The opinion is very short, but the court holds the sale invalid because made less than 12 weeks from the first publication. It will be noticed that in all these cases stress is laid upon the necessity of the statutory time elapsing from the day of the first publication.

The North Dakota case is another of this kind (Finlayson vs. Peterson, 67 N. W. Rep. 953). This was a foreclosure sale, and the language of the statute was, "by publishing the same for six successive weeks at least once in each week." The court says of the proceedings: "The only point urged against their legality is that the first notice of sale was not published at least 42 days before the day of sale." This is all there is in this case, and the court can readily see how inapplicable it is. The opinion is of some length and recognizes the doctrine laid down in the cases to which reference will be made later on, that the publication need not be made on the same day in each week.

This is the important point to remember here. The federal statute requires a publication "at least once a week for ninety days." Havens' notice appeared first on Monday, January 7th. If the rule of the federal courts be followed and the first publication be included, then the 90 days expired on Saturday, April 6th; and there were six publications in every calendar week but the last, and in that one there were two, towit, Monday and Tuesday, April 1st and 2nd. The service then was complete on Saturday, April 6th, and the default could properly be claimed by Havens 90 days thereafter, towit, on July 6th, 1889.

In support of the lower court's construction of the statute we cite the following

AUTHORITIES:

In Ronkensdorff vs. Taylor's Lessee, 4 Peters 349 (7 Lawyers' Co-Op. Rep. 882), the law required notice of a sale to be published "once a week for three months." The publication was had on different days in the week and there were some instances of more than a week between the publications, although made in each calendar week. For instance, there was one skip from Monday, January 6th, to Saturday, January 18th; another from Wednesday, February 19th, to Saturday, March 1st. But the court held that there was no violation of the statute in this, as the publication in each instance was made within the calendar week, and the full length of time expired from the first publication before the sale took place. The court said: "It would be a most rigid construction of the Act of Congress, justified neither by its spirit nor its language, to say that this notice must be published on any particlar day of the week. If published once a week for three months the law is complied with and its object effectuated." Could there be any possible difference if, instead of saying, as the law did there, "once a week for three months," it had said "once a week for ninety days?"

The case of the State of Nevada vs. Yellow Jacket Silver Mining Co., 5 Nev. 415, is much stronger than the case at bar. The law required an election notice to be published once a week for three weeks, and the first advertisement was July 19th, and the election August 5th. The court says: "The language of the statute, it is claimed, makes it necessary that the first publication should be 21 days prior to the election; but in my opinion the statute admits of no such construction. The purpose of the advertisement is to give notice to the legal voters of the school district. When there have been three insertions of such notice upon three successive weeks the object of the publication, so far as it can be, is accomplished. The statute certainly requires but three publications of the notice; why, then, is not its full purpose

accomplished upon the expiration of the third day of publication?"

The case of Bachelor vs. Bachelor, 1 Mass. 256, is to the same effect, where it was held that "an order to give notice by publishing in a newspaper three weeks successively," was complied with by publishing in such paper in three successive weeks. In that case the paper being issued twice a week, only 12 days elapsed between the first and last advertisement; but as there was one advertisement in three successive weeks th court held it sufficient.

This is the doctrine approved by the New York Court of Appeals in two cases construing a similar statute to that of Nevada.

Sheldon vs. Wright, 5 N. Y. 497.
Alcott vs. Robinson, 21 N. Y. 150.

To the same effect see the following New York cases:

De Peyster vs. Michael, 6 N. Y. 467.
Wood vs. Moorehouse, 45 N. Y. 368.
Chamberlain vs. Dempsey, 13 Abb. Pr. 421.
Steinze vs. Bell, 12 Abb. Pr. (N. S.) 171.
Wood vs. Knapp, 100 N. Y. 109.

In the case of the Savings & Loan Society vs. Thompson, 32 Cal. 347, the question of the legality of a service of summons by publication was involved. The statute required a publication "at least once a week," and further "provided the publication shall not be less than three months." The summons was published on the 10th, 15th, 22nd and 29th of January, the 5th, 12th, 19th and 26th of February, the 5th, 12th, 19th and 26th of March, and the 2nd and 9th of April, 1865. Counsel for appellants contended, as counsel do here, that the full period of three months should elapse between the first and last publication, and

they cited the case of Early vs. Doe also. They contended that under their statute, which is like our State statute, the 10th of January should be excluded, and that therefore the counting must begin on January 11th, and that as April 9th was Sunday, that should be excluded by the statute, and therefore the service would expire April 8th. The court was not deeply impressed with this contention. Counsel must have argued there, as here, that the cases on which this judgment rests were notices requiring some act to be done on a designated day named in the notice, as the court says: "The cases arise upon notices of sheriff's sales, notices in insolvent cases, etc., under statutory provisions requiring notice to be published weekly for six weeks and three months and the like, as the case may be, before some act to be done on a designated day of which notice is given. In no one of the cases was it held that the six weeks or three months must elapse between the first and last publication, or that the notice had not been published a sufficient number of times, or to a sufficiently late day. No such question was in any of the cases. The difficulty was not that the notice had not been published the full number of times, or to a sufficiently late day, but that sufficient time had not elapsed between the first publication and the time appointed for doing the thing of which notice was given." The court considered the case of Early vs. Doe, and continues: "We think that the summons had been published for three calendar months at the close of the 9th day of April, and that the first day of the 40 within which the defendant was required to answer was on the 10th of April. But even if the three months' publication did not expire till the 10th of April there was no necessity for another publication. The 10th was in the same week with the 9th, and the summons had been published in that week. It had been published once in every one of the weeks that could by any possibility, in whole or in part, be brought into the three calendar months. This is sufficient under the decision in Ronkendorff vs. Taylor, 4 Peters

361, and we know of no decision to the contrary. The only difference it could make would be that the 40 days within which the defendant is required to answer would not commence to run till the 11th, instead of the 10th, for then the service could not be complete until the expiration of the 10th. The summons does not absolutely fix the day for answering, but requires the defendant to answer within a given number of days after the service of summons. The day for the defendant to act is left open by the summons, depending upon the time when the service is made or is complete. It is a matter of no consequence, then, whether the service was complete on the expiration of the 9th or 10th of April, for the time within which to answer did not begin to run till service was complete."

In Knowlton vs. Knowlton, 39 N. E. Rep. 595, in the Supreme Court of Illinois, it was held that an order in a suit for divorce, requiring notice to the defendant to be published "for two weeks successively" before the term of the court, was complied with by publishing once in each of two successive weeks though the first publication was made only 12 days before the first day of the term. It cites the following cases from Illinois, as supporting the same doctrine:

Madden vs. Cooper, 47 Ill. 359.
Pierson vs. Bradley, 48 Ill. 250.
Andrews vs. People, 84 Ill. 28.
Garrett vs. Mauss, 20 Ill. 549.

In Raum vs. Leech, 54 N. W. Rep. 1058, in the Supreme Court of Minnesota, the action was one to determine an adverse claim to real property, and the question of sufficiency of publication of a summons was involved. The statute required publication "once in each week for six consecutive weeks," and the only question was as to the necessity of publishing on the same day in each of the six weeks. Publication had been in a daily newspaper as follows: Tuesday, February 7th; Tuesday, Feb-

ruary 14th; Thursday, February 23rd; Thursday, March 2nd and 9th, and finally on Wednesday, March 15th. The counsel for the respondent in the court above contended that as the first publication was upon Tuesday, each succeeding one should have been on the same day of the week, and this was the view the court below had taken. But the court above reversed this decision, citing in support the case in 4th Peters and others. Says the court: "We are unable to hold that the statute has not been complied with. The summons appeared once in each of the six periods of seven days duration, beginning upon and which followed consecutively the date just mentioned, Tuesday, February 7th. We construe the statute as authorizing just such a publication. The statutory week must commence upon the day of the first publication, and there is nothing in the language used which would justify the conclusion that because the publication must be once in each week, the day of the first publication must determine the day on which each subsequent publication is to be made and that exactly seven days must intervene between each."

In Wisconsin the doctrine contended for here is recognized fully. In Cox vs. North Wisconsin Lumber Co., 51 N. W. Rep. 1130, it was held, under a statute requiring publication "once a week for six successive weeks," that where there were six publications of summons, each on the first day of six successive weeks, the publication was sufficient and the service became complete a week after the last publication, although but 35 days had elapsed between the first and last publication, and not 42, as counsel would contend here should be the case. But the court says: "It is true that there were less than 42 days from the time of the first publication to the time of the last publication; that is to say, from October 5th, 1889, to November 9th, 1889, but there were nevertheless six publications, each on the first day of six successive weeks. Of course the time for Hansen to answer did not begin to run until the expiration of the last

week, that is to say, November 16th, 1889. But the trial did not occur, and his default was not entered until April 4th, 1890, so that there can be no objection on the ground that Hansen was not in default." This is followed in the same court in Johnson et al., vs. Hill, 62 N. W. Rep. 930, in which again but 35 days elapsed between the first and last publication; but the court held that inasmuch as there were six publications, one in each week, and as more than seven weeks elapsed from the time of the first publication to the time fixed for the hearing, the statute requiring a publication for six successive weeks prior to the time of hearing was complied with.

In Wilson et ux., vs. Scott et al., 29 Ohio State 636, the question of the sufficiency of publication of notice of a foreclosure sale was involved. The statute required notice of the time and place of sale to be given for "at least 30 days before the day of sale," etc., and "where such advertisement was made in a newspaper published weekly it should be sufficient to insert the same in five consecutive numbers thereof." It seems that the first of the weekly publications was made on Wednesday instead of Thursday, the usual day of publication. But the court held: "Where the advertisement is made in a weekly paper it is not essential that it appear in numbers published on the same day of each week. It is sufficient if it be published in each number for five consecutive weeks, provided the first number be published for at least 30 days before the day of sale. In this count, the day of publication may be included, but the day of sale must be excluded. In the case before us, the first number in which the notice was inserted was published on the 1st of December, and the sale took place on the 31st of the month; we are of opinion, therefore, that the period of advertisement was sufficient, notwithstanding the first number of the weekly newspaper in which it appeared was published one day in advance of the usual day of publication."

In Martin et al., vs. Hawkins, 35 S. W. Rep. 1104, in the Supreme Court of Arkansas, the question of the sufficiency of a publication was involved under a statute requiring publication "for six weeks in succession." The first publication was made on July 30th and the last on September 3rd, 1887; the hearing under the notice took place during the September term, 1888. The court says: "The notice was published by six successive weekly insertions—the first on the 30th of July, and the last on the 3rd of September—constituting, it is true, a period of time equal to 37 days; yet, according to the weight of authorities, the notice so published must not be measured by such a restricted rule. The notice must be published six weeks in succession, six months before the beginning of the term at which the petition is to be heard. The petition in this case was called up for hearing on January 17th, 1889, and during the September term, 1888. The September term of the Garland Circuit Court began at that time on the fourth Monday of September, and it appears that this was more than six months subsequent to the 10th of September, 1887, giving the longest possible time for the notice to run—six full weeks or 42 days from the first publication and the six months thereafter before the beginning of the term." This case is another quite analagous to the case at bar, in which no particular day is designated in the notice, but the publication was completed at the expiration of the term required by law from the date of the first publication, provided in the meantime the notice has appeared at least once in each week; and that at the expiration of the term required by law from the date of the first publication, provided in the meantime the notice has appeared at least once in each week; and that at the expiration of the required number of weeks or days a further time must elapse (in the Arkansas case six months, in ours 90 days) before the default can be claimed.

In McDonald vs. Cooper, 32 Fed. Rep. 745, the same contention must have been made as here, that the full term should

expire between the first and the last publication, but the court treats the subject very summarily, simply saying: "The objection that the decree was given without the publication of the summons as directed in the order is not well founded. The summons was published six times in six successive weeks as directed, and more than 42 days elapsed from the first publication to the entry of the decree."

The court in the 32nd California case, referred to in the case of Ronkensdorff vs. Taylor's Lessee, in 4th Peters, as establishing a doctrine that has never been contradicted. A number of cases have been referred to herein as supporting the doctrine there established. The cases cited by appellant's counsel do not dispute that doctrine, but simply establish another, recognized in Early vs. Doe, in 16th Howard, and not disputed here, that the statutory time must elapse after the first publication; but that is not the question here, as this court can readily see. The question here is simply whether a statute requiring publication "at least once a week for 90 days" shall be construed as requiring what it says, once a week for ninety days, or what counsel for appellant contend, once each secular day for ninety days, or at least a first and last publication 90 days apart. Without intending to belittle counsel's contention, the writer must be excused for saying that to him such a construction seems forced, unnatural and unreasonable; that the language is too plain for any other construction than that adopted by the Supreme Court of South Dakota and recognized by the decisions here cited. There has been more than a compliance with the requirements of the statute. Instead of once a week there have been six publications in every week but the last, and in that there have been two, while the statute would have been complied with amply had there been simply a publication on Monday of each week, beginning with January 7th, terminat-

ing April 1st; then the 90 days would have expired April 6th, and the default be complete on July 6th, 1889. Upon this point, therefore, it must be apparent that the trial court was correct.

We respectfully submit: First, the writ of error should be dismissed; or, second, if this court shall retain jurisdiction the judgment should be affirmed.

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